Filed 12/27/18 Taylor v. Cate CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RODNEY TAYLOR, JR., et al.,

Plaintiffs and Appellants,

v.

MATTHEW CATE et al.,

Defendants and Respondents.

F075378

(Super. Ct. No. 16C-0049)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. James T. LaPorte, Judge.

Boucher, Raymond P. Boucher, Milin Chun and Brian M. Bush for Plaintiffs and Appellants.

Xavier Becerra, Attorney General, Monica N. Anderson, Assistant Attorney General, Neah Huynh and Joseph R. Wheeler, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiffs brought this negligence action against officials of the California Department of Corrections and Rehabilitation (Department), alleging their father's death was caused by valley fever he contracted in prison. The defendants filed a motion for

judgment on the pleadings, arguing the claim was barred because plaintiffs did not comply with the claim presentation requirements in the Government Claims Act (Gov. Code, § 810 et seq.)[1] before filing suit. In response, plaintiffs argued defendants are estopped from asserting the untimeliness of their claim because plaintiffs reasonably relied on an implied representation that their application for leave to present a late claim had been granted. In addition, plaintiffs argued the untimeliness defense had been waived. The trial court rejected plaintiffs' arguments, granted the motion for judgment on the pleadings without leave to amend, and entered judgment in favor of defendants.

On appeal, plaintiffs contend the existence of equitable estoppel—usually a question of fact—should not have been decided against them as a matter of law at the pleading stage. Alternatively, plaintiffs contend they should have been granted leave to amend their complaint to allege additional facts relating to estoppel.

We conclude plaintiffs' argument that there was an implied representation their application for leave to file a late government claim had been granted lacks merit in the factual and legal context of this case. First, the letter rejecting plaintiffs' claim made no mention of their application for permission to file a late claim. Second, section 911.6 expressly provides that applications for leave to file a late claim not acted on within 45 days are deemed denied. Plaintiffs should have realized this statutory provision applied and their application was deemed denied by operation of law—not impliedly granted. Accordingly, plaintiffs should have filed a petition for a court order relieving them from the timing requirements for presenting a claim. (See §§ 946.6, 945.4.) Without such relief, this lawsuit is barred by their failure to submit their government claim form within the six-month period specified in section 911.2.

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[1] Subsequent unlabeled statutory references are to the Government Code.

Finally, the additional factual allegations described by plaintiffs are not sufficient to establish defendants are estopped from raising the untimeliness of plaintiffs' claim. Consequently, leave to amend the complaint was properly denied.

We therefore affirm the judgment.

FACTS

Rodney Taylor, Sr. (Taylor) was in the custody of the Department for a nonviolent drug offense. In 2010, the Department transferred him to Avenal State Prison. In November 2010, shortly after the transfer, Taylor contracted a fungal infection commonly referred to as valley fever. Valley fever, also called coccidioidomycosis, is contracted by the inhalation of the fungus *Coccidioides immitis*, which is present in arid soils of various areas of the Southwest.

In May 2014, Taylor was released from prison and immediately hospitalized. Taylor remained hospitalized until his death on August 5, 2014.[2] He was 47 years old. His death certificate lists the cause of death as "[m]ultiple organ failure and disseminated coccidioidomycosis."

Taylor's children—Davidetta Taylor, Rodney Taylor, Jr., and Charletta Brooks—are the plaintiffs in this wrongful death action. On February 6, 2015, each plaintiff submitted a claim to the California Victim Compensation and Government Claims Board

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[2] The year before his release and death, Taylor was among a handful of inmates who filed a federal class action lawsuit against the State of California, the Department, and various officials. The federal lawsuit was filed in July 2013 by inmates who had contracted valley fever while incarcerated. The inmates alleged deliberate indifference to a substantial risk of serious harm to them and similarly situated inmates. After Taylor died, it does not appear that a representative, such as an administrator of his estate, was substituted as a party in the federal action. (See Fed. Rules Civ. Proc., rule 25(a), 28 U.S.C. [substitution of parties when a party dies].) In September 2015, the district court granted a motion for judgment on the pleadings on the grounds the defendants named in that action were entitled to qualified immunity from the inmates' Eighth Amendment claim. (*Jackson v. Brown* (E.D.Cal. 2015) 134 F.Supp.3d 1237.)

(Claims Board)[3] in Sacramento using the preprinted government claim form. The claim forms asserted the deliberate and negligent acts of various state officials caused Taylor to contract valley fever and suffer death on August 6, 2014. A copy of the death certificate, which stated the date of death was August 5, 2014, was attached to each claim form. It is undisputed that the death certificate was accurate, and the date of death stated in the claim forms was off by one day.

On March 9, 2015, the Claims Board sent counsel for Rodney Taylor, Jr., a letter acknowledging receipt of his claim and informing him of the claim number assigned to it. The letter stated: "Based on its review of your claim, Board staff believes that the court system is the appropriate means for resolution of these claims, because the issues presented are complex and outside the scope of analysis and interpretation typically undertaken by the Board. The Board will act on your claim at the April 16, 2015 meeting. You do not need to appear at this meeting. The Board's rejection of your claim will allow you to initiate litigation should you wish to pursue this matter further." The letter listed telephone numbers to contact in the event of questions. On March 13, 2015, the Claims Board sent nearly identical letters to counsel addressing the claims submitted on behalf of Davidetta Taylor and Charletta Brooks.

On April 14, 2015, counsel for plaintiffs sent letters to the Claims Board "in application for leave to present a late government claim." The letters stated the government claim form had been submitted one day after the statutory deadline of February 5, 2014, due to counsel's mistake, inadvertence, and excusable neglect in

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[3] In 2016, the Legislature amended the Government Claims Act by transferring the duties relating to government claims from the Claims Board to the Department of General Services and the Controller. (Stats. 2016, ch. 31, § 34; see Legis. Counsel's Dig., Sen. Bill No. 836 (2015-2016 Reg. Sess.), p. 6.)

miscalendaring the deadline.[4] The letters asked the Claims Board to grant the applications for leave to present late claims and to accept the claims for consideration. The letters were marked "RECEIVED" on April 16, 2015.

April 16, 2015, was also the day the Claims Board met and rejected plaintiffs' claims. Letters to plaintiffs' counsel dated April 24, 2015, stated the Claims Board "rejected your claim at its meeting on April 16, 2015." The letters did not state the grounds for the Claims Board's decision and did not refer to the applications for leave to present late claims. The letters included the following warning:

> "Subject to certain exceptions, you have only six (6) months from the date this notice was … deposited in the mail to file a court action on this claim. See Government Code Section 945.6. You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

After sending the rejection letters, the Claims Board took no formal action on plaintiffs' applications for leave to present late claims. Also, the Claims Board never informed plaintiffs of the status of their applications.

PROCEEDINGS

On October 22, 2015, plaintiffs filed a complaint seeking damages for the wrongful death of Taylor. The defendants named in the complaint were Arnold Schwarzenegger, governor of the State of California from November 2003 to January 2011; Matthew Cate, secretary of the Department from 2008 through 2012; and James D. Hartley, warden of Avenal State Prison during the years 2007 through 2013. Cate and Hartley—the only respondents in this appeal—are referred to collectively as "defendants."

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[4] The statutory deadline is established by section 911.2, subdivision (a), which provides that a claim relating to a cause of action for death or for injury to a person must be presented not later than six months after the accrual of the cause of action.

In May 2016, defendants and Schwarzenegger filed a demurrer asserting the complaint failed to state facts sufficient to constitute a cause of action because they were immune from liability under various provisions of the Government Code. In addition, Schwarzenegger argued he owed no duty of care to Taylor. In June 2016, the trial court rejected defendants' immunity argument and accepted Schwarzenegger's argument that the allegations were insufficient to show he owed any duty to Taylor. The trial court sustained the demurrer as to Schwarzenegger with leave to file a first amended complaint and overruled the remainder of the demurrer. Plaintiffs chose not to amend. As a result, in August 2016, the trial court filed an order dismissing the claims against Schwarzenegger with prejudice.

In October 2016, defendants filed a motion for judgment on the pleadings. The motion asserted plaintiffs failed to comply with the California Government Claims Act, which barred their lawsuit. Specifically, defendants argued plaintiffs did not present their claims within the six-month period specified by statute, did not obtain leave to present a late claim, and did not obtain relief from the claim presentation requirements. Defendants supported their motion with a request for judicial notice of the Claims Board's records relating to the claims pursued by plaintiffs.

In November 2016, the trial court held a hearing on the motion for judgment on the pleadings. On January 5, 2017, the court filed an order granting the motion without leave to amend.

On January 24, 2017, the trial court filed two judgments. One judgment was entered in favor of defendants Cate and Hartley based on the January 5, 2017, order granting their motion for judgment on the pleadings. The other judgment implemented the August 2016 order dismissing with prejudice the causes of action against Schwarzenegger. In February 2017, notices of entry of the judgments were served. In March 2017, plaintiffs filed a notice of appeal that referred to a judgment or order entered on January 24, 2017.

DISCUSSION

I. NOTICE OF APPEAL

Defendants contend this court lacks jurisdiction over the appeal because plaintiffs' notice of appeal is defective. We disagree.

Plaintiffs submitted their notice of appeal using optional Judicial Council of California form APP-002 (rev. Jan. 1, 2017). The notice states plaintiffs appeal "from the following judgment or order in this case, which was entered on (*date*): January 24, 2017." Following this lead-in, the form sets forth nine lines (each preceded by a box) that provides further information about the order or judgment being appealed. Plaintiffs placed an "x" in the box before the line that reads "An order after judgment under Code of Civil Procedure, § 904.1(a)(2)."

Defendants have identified two problems with the notice of appeal. First, two judgments were entered on January 24, 2017, the date typed onto the form, and the notice of appeal does not contain information identifying which judgment is being challenged or, alternatively, stating that both judgments are being challenged. Second, there was no order after judgment entered in the trial court and, as a result, the "x" in the box before the line referring to "[a]n order after judgment under Code of Civil Procedure, § 904.1(a)(2)" refers to a nonexistent order.

California Rules of Court, rule 8.100(a)(2) provides in relevant part: "The notice of appeal must be liberally construed. The notice is sufficient if it identifies the particular judgment or order being appealed." The purpose of liberal construction is to protect the right of appeal if it is reasonably clear what the appellant was trying to challenge on appeal and where the respondent could not possibly have been misled or prejudiced. (*In re Joshua S.* (2007) 41 Cal.4th 261, 272.)

The boxes on the notice of appeal form are used to identify the particular subdivision of Code of Civil Procedure section 904.1 that authorizes the appeal.

Checking the wrong box does not necessarily render a notice of appeal insufficient. (*Ellis Law Group, LLP v. Nevada City Sugar Loaf Properties, LLC* (2014) 230 Cal.App.4th 244, 251.) In *Sugar Loaf*, the court stated "the notice of appeal clearly indicated the subject of the appeal was the order entered on September 10, 2012." (*Ibid*.) The notice of appeal in question referred to an order entered on September 10, 2012, and also "stated a motion for reconsideration had been filed on September 21, 2012, and was denied on November 14, 2012." (*Id*. at p. 250.) Under these facts, the appellate court stated the information in the notice of appeal could "only refer to the order granting attorney fees to [the respondent]." (*Id*. at p. 251.) As a result, the court concluded "the notice of appeal was sufficient even if the wrong box was checked." (*Ibid*.) Consequently, appellant's mistake of checking the wrong box did not deprive the appellate court of jurisdiction.

Here, we conclude plaintiffs' mistake of checking the wrong box on the notice of appeal did not cause the notice of appeal to be insufficient. There was no postjudgment order entered in this case, much less a postjudgment order filed on January 24, 2017. Accordingly, the only rational way to construe the notice of appeal is to infer plaintiffs made a mistake and checked the wrong box. Consequently, neither this court nor an objectively reasonable person would be misled by the "x" in the wrong box.

Next, we consider whether the remaining information provided by the notice of appeal is sufficient. This question can be restated as whether the notice of appeal is insufficient because it does not expressly identify which of the two judgments entered on January 24, 2017, plaintiffs were challenging. The facts relevant to this inquiry include the proceedings that occurred prior to the entry of the two judgments.

In June 2016, the trial court sustained Schwarzenegger's demurrer with leave to "file a first amended complaint 20 days after notice of ruling to allege any specific facts to support a claim that defendant Schwarzenegger had a duty to plaintiffs' father and breached this duty by his acts or his failure to act." Plaintiffs chose not to file a first

amended complaint, a decision they characterize as their agreement to dismiss Schwarzenegger from the case. Well after the 20-day period for filing an amended complaint expired, the Attorney General's Office submitted a proposed order granting Schwarzenegger's ex parte application to dismiss. Plaintiffs did not oppose the application. On August 18, 2016, the trial court signed and filed the order dismissing all causes of action against Schwarzenegger with prejudice. These facts support the interpretation that plaintiffs' notice of appeal was not intended to reach the judgment in favor of Schwarzenegger. In contrast, the foregoing facts and plaintiffs' opposition to defendants' motion for judgment on the pleadings provide no reasonable basis for inferring plaintiffs did not intend to appeal the judgment entered in favor of defendants.

Defendants rely on a case in which the court stated a notice of appeal might be "so specific it cannot be read as reaching a judgment or order not mentioned at all." (*Filbin v. Fitzgerald* (2012) 211 Cal.App.4th 154, 173.) Here, excluding the obvious mistake in the notice of appeal,[5] the notice is not so specific that it fails to reach the judgment against defendants. Instead, the notice of appeal is reasonably construed as reaching the judgment in favor of defendants because the notice of appeal accurately provides the date on which that particular judgment was entered. Stated another way, it is not reasonable to construe the notice of appeal as failing to reach any judgment entered on January 24, 2017. Thus, *Filbin* does not support the conclusion that plaintiffs' notice of appeal does not reach the judgment in favor of defendants.

Another inquiry is whether the respondents were misled or prejudiced by the notice of appeal. (See *In re Joshua S., supra*, 41 Cal.4th at p. 272.) Here, defendants have presented no argument describing how they were misled or prejudiced by the contents of the notice of appeal.

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5 The obvious mistake of referring to a nonexistent order after judgment must be ignored under the rule of liberal construction, as it would be objectively unreasonable not to recognize an obvious mistake.

In sum, after excluding the obviously mistaken reference to an order entered after judgment, the notice of appeal's description of an order or judgment entered on January 24, 2017, plainly encompasses the judgment entered in favor of defendants on that date. Accordingly, we conclude the notice of appeal is sufficient to give this court jurisdiction to review that judgment.

II. COMPLIANCE WITH GOVERNMENT CLAIMS ACT

A. Standard of Review

Plaintiffs' failure to file a timely claim and subsequent failure to obtain relief from the claim presentation requirements, together with the related argument about estoppel, were raised at the pleading stage of this lawsuit pursuant to a motion for judgment on the pleadings. A motion for judgment on the pleadings, like a demurrer, addresses whether the complaint alleges facts sufficient to state a cause of action. (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 166 (*Angelucci*).) When reviewing an order granting a motion for judgment on the pleadings, appellate courts exercise their independent judgment. (*Ibid*.)

Under California law, an element of a cause of action against public officials is compliance (or an excuse from complying) with the claim presentation requirements set forth in the Government Claims Act. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1239–1240.) In evaluating defendants' contention that plaintiffs cannot demonstrate compliance or an excuse, we accept as true all material facts properly pled and supplement those facts with any matter of which the trial court took judicial notice. (See *Angelucci*, *supra*, 41 Cal.4th at p. 166.)

B. Background

1. Untimely Claims

The following facts are undisputed. Taylor died on August 5, 2014. Plaintiffs submitted their claim forms to the Claims Board on February 6, 2015. The claim forms were submitted six months and one day after the date of death.

Section 911.2 requires claims relating to a cause of action for death or for injury to a person to be presented to the Claims Board not later than six months after the accrual of the cause of action. Typically, "the date of accrual of a cause of action for wrongful death is the date of death." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 404; *Larcher v. Wanless* (1976) 18 Cal.3d 646, 656.)

Using Taylor's date of death as the day on which plaintiffs' wrongful death cause of action accrued, plaintiffs' claim forms were submitted six months and one day after that accrual date. As a result, plaintiffs failed to comply with the six-month time limit stated in section 911.2. Failure to present a timely claim in accordance with the Government Claims Act bars the claimant from filing a lawsuit, even if the public entity had actual knowledge of the circumstances surrounding the claim. (*California Restaurant Management Systems v. City of San Diego* (2011) 195 Cal.App.4th 1581, 1591.)

2. Application for Leave to Present a Late Claim

When a claim is not presented within the six months specified in section 911.2, "a written application may be made to the public entity for leave to present that claim." (§ 911.4, subd. (a).) Such an application must be presented "within a reasonable time not to exceed one year after accrual of the cause of action and shall state the reason for the delay in presenting the claim." (§ 911.4, subd. (b).) The proposed claim must be attached to the application. (*Ibid*.)

Pursuant to subdivision (a) of section 911.6, the Claims Board "shall grant or deny the application within 45 days after it is presented to the board." The application shall be

granted if the failure to present the claim was through mistake, inadvertence, or excusable neglect and the public entity was not prejudiced in its defense of the claim by the failure to present the claim within the six-month period specified in section 911.2. (§ 911.6, subd. (b)(1).) Subdivision (c) of section 911.6 provides: "If the board fails or refuses to act on an application within the time prescribed by this section, the application shall be deemed to have been denied on the 45th day."

When a late claim application is deemed denied pursuant to subdivision (c) of section 911.6, the applicant's last recourse is to petition the court for relief from the claim filing requirements. (*J.M. v. Huntington Beach High School Dist.* (2017) 2 Cal.5th 648, 653–656 (*J.M.*); 2 Haning, et al., *Cal. Practice Guide: Personal Injury* (The Rutter Group 2018) ¶ 5:61, p. 5-55.) "The petition shall be filed within six months after the application to the board is … deemed to be denied pursuant to Section 911.6." (§ 946.6, subd. (b).) This six-month period is a mandatory statute of limitations. (*J.M.*, *supra*, at p. 653.)

Section 946.6, subdivision (c) provides that the court "shall relieve the petitioner from the requirements of Section 945.4" if the court finds (1) the late claim application was made within a reasonable time; (2) the application was deemed denied; (3) the failure to present the claim was through mistake, inadvertence, or excusable neglect; and (4) the public entity failed to show it would be prejudiced in the defense of the claim if the court relieved the petitioner of the requirements of section 945.4 (which include presenting the claim within the six-month period specified in section 911.2). In our Supreme Court's view, this statutory scheme operates to keep the process moving, and allows an action to go forward if a court determines that the application for leave to file a late claim is meritorious. (*J.M.*, *supra*, 2 Cal.5th at p. 653.)

C. Estoppel

Plaintiffs contend defendants should be equitably estopped from raising the untimeliness of the submission of their government claim forms. We disagree.

1. Elements of Equitable Estoppel

Equitable estoppel arises where a prospective defendant induces a prospective plaintiff to forgo protecting his or her rights, the plaintiff subsequently attempts to assert the rights, and the defendant raises a defense based on the plaintiff's lapse. (30 Cal.Jur.3d (2013) Estoppel and Waiver, § 3, p. 824.) Equitable estoppel involves some degree of fault or blame on the part of the party to be estopped. (*Ibid*.) "[T]he doctrine will not be applied against one who is blameless." (*Ibid*.)

Our Supreme Court has described California's doctrine of equitable estoppel as containing four or five elements. (See 30 Cal.Jur.3d, *supra,* Estoppel and Waiver, § 7, pp. 833–834.) "Generally speaking, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305 (*Driscoll*); see *J.M.*, *supra*, 2 Cal.5th at p. 656 [quoting *Driscoll*'s version of the elements].)

In 2008, Justice Chin, writing for a unanimous court, set forth the five-element version of the doctrine: "A valid claim for equitable estoppel requires: (a) a representation or concealment of material facts; (b) made with knowledge, actual or virtual, of the facts; (c) to a party ignorant, actually and permissibly, of the truth; (d) with the intention, actual or virtual, that the ignorant party act on it; and (e) that party was induced to act on it. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527–528.) There can be no estoppel if one of these elements is missing. (*Id*. at p. 528.)" (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 584.) Though not stated in either version of the elements, a plaintiff's reliance upon, or being induced by, the defendant's conduct must be reasonable under the circumstances. (*Santos v. Los Angeles Unified School Dist.*

(2017) 17 Cal.App.5th 1065, 1076 (*Santos*).) For purposes of this appeal, we will use the more detailed statement of the elements of equitable estoppel.

The elements involving knowledge, intent and reasonable reliance lead to the conclusion that equitable estoppel normally presents questions of fact for the court to decide. (*Santos, supra,* 17 Cal.App.5th at p. 1076.) However, when the evidence is not in conflict and is susceptible to only one reasonable interpretation, the existence of estoppel is a question of law. (*Driscoll, supra,* 67 Cal.2d at p. 305.)

2. Application of Estoppel to Governmental Entities

"The doctrine of equitable estoppel may be applied against the government where justice and right require it." (*Driscoll, supra,* 67 Cal.2d at p. 305; 30 Cal.Jur.3d, *supra,* Estoppel and Waiver, § 5, pp. 826–829 [availability against governmental entities].) More specifically, "[i]t is well-settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act." (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 445; see *J.M., supra,* 2 Cal.5th at p. 656 ["elements of equitable estoppel have been applied in the government claims context"].)

"Equitable estoppel generally requires an *affirmative* representation or act by the public entity." (*J.M., supra,* 2 Cal.5th at p. 657.) For example, it is not uncommon for equitable estoppel to result from a public entity's misleading statements relating to the claims procedure. (See *Santos, supra,* 17 Cal.App.5th at pp. 1075–1076.) Also, estoppel may be found where the public entity engaged in calculated conduct or concealed facts that induced the plaintiff to forego action required by the claims statute, such as filing a claim or bringing the lawsuit with the statutory time. (*Ibid.*)

3. Plaintiffs' Estoppel Theory

Plaintiffs address the element relating to the Claims Board's knowledge of the facts by contending the Claims Board was apprised of the actual date of Taylor's death

by the copies of the death certificate provided with the original claim forms and by their late claim applications. Thus, plaintiffs contend the Claims Board actually knew their claims were late when the Claims Board sent the rejection letters. As to the estoppel elements relating to conduct and intent, plaintiffs contend the Claims Board sent the April 24, 2015, rejection letters with the intent that plaintiffs would proceed to file a lawsuit within the six-month period stated in the letters.

The elements of equitable estoppel that are dispositive in this appeal relate to plaintiffs' ignorance and reasonable reliance. Plaintiffs contend (1) they were entirely ignorant of the fact that the Claims Board was not acting on their late claim applications and (2) their reliance on the April 24, 2015, letters resulted in them not filing a petition in court requesting relief from the claim presentation requirements. (See § 946.6 [petition for relief from claim presentation requirements].) Plaintiffs contend the factual questions presented by the application of equitable estoppel to the circumstances presented, at the very least, preclude determining as a matter of law that estoppel does not apply. In other words, they argue the factual questions related to their ignorance and reasonable reliance cannot be resolved at the pleading stage.

In response, the Claims Board argues the claims presented by plaintiffs were timely on their face due to the misstatement of the date of Taylor's death, and it has a duty to act on claims that appear timely. Having decided to reject the claims that appeared timely, the Claims Board contends it was required by section 913 to provide notice of rejection and to include the statutory warning about the six-month period for filing a civil action. The Claims Board argues the rejection letters are not the type of improper conduct that results in estoppel because the letters did not affirmatively misrepresent any fact or conceal any fact. The Claims Board asserts it properly relied on the sworn statement of plaintiffs' counsel as to the date the causes of action accrued when it issued the rejection letters. Plaintiffs, who were aware the information in the claim

forms was misleading and the claims were untimely, could not reasonably believe the rejection letters showed the Claims Board had granted their applications.

Based on the foregoing arguments, we consider whether plaintiffs acted reasonably when they relied on the rejection letters and took no further action to satisfy the claim presentation requirements.

4. Harvey *Decisions*

In the trial court, plaintiffs argued they reasonably relied on the Claims Board's implied representation that their applications for leave to present late claims were granted. They cited *Harvey v. City of Holtville* (1969) 271 Cal.App.2d 816 (*Harvey II*), arguing that case presented "uniquely similar circumstances." On appeal, the parties dispute whether *Harvey II* provides useful precedent.

In *Harvey v. City of Holtville* (1967) 252 Cal.App.2d 595 (*Harvey I*), the claimant was a minor who was injured on March 29, 1964, when she was five years old. (*Id*. at p. 596.) No claim was presented to the defendant city within the then-applicable 100-day period. (*Ibid*.) One year later, on March 29, 1965, her father, pursuant to provisions in the Government Claims Act, filed an application with the city council for leave to present a late claim. A claim was attached to the application. (*Harvey I, supra,* at p. 596.) Those provisions directed the public entity to grant the application where the person injured was a minor and the application to present a late claim was made within a reasonable time not to exceed one year. (*Ibid*.) About two weeks later after the application was filed, the city clerk sent plaintiff's counsel a letter that "'acknowledge[d] receipt of the claim'" and stated the city council by a resolution adopted at its meeting the prior evening had "'denied the claim and referred it to the city's insurance carrier.'" (*Ibid*.) Two months later, the minor's father filed a lawsuit against the city. The city demurred, arguing the complaint did not allege the presentation of a claim within the time prescribed by statute. The trial court sustained the demurrer and the plaintiff then filed a

petition in that lawsuit requesting leave to present a late claim against the city. (*Id*. at pp. 596–597.) The statute governing such petitions required the petition to be filed within 20 days after the application was denied or deemed denied—a requirement that was mandatory and jurisdictional. (*Id*. at p. 597.) To address the fact that the 20-day requirement had not been met, the plaintiff alleged the city was estopped from arguing the petition should be denied because it was not filed within the prescribed time. (*Ibid*.) The trial court rejected the estoppel argument and denied the petition to file a late claim. (*Id*. at p. 596.) The plaintiff appealed. (*Ibid*.)

In *Harvey I*, the appellate court affirmed the denial of the petition to file a late claim because the jurisdictional requirement that the petition be filed within 20 days had not been met. (*Harvey I*, *supra*, 252 Cal.App.2d at p. 597.) The court relied on the principle that jurisdiction may not be conferred by estoppel. (*Ibid*.) Then, the court went beyond the issue presented by the denial of the petition and addressed the facts presented insofar as they affected the claim presentation requirement:

> "In the event the letter from the city clerk accurately stated the action taken by the city council, no estoppel is involved. If the city council denied plaintiff's claim it acted upon the claim. The authority to act was premised upon presentation within the time allowed by statute. By its action the council *impliedly* granted plaintiff's application to make a late presentation.
>
> "On the other hand, an estoppel question is presented if the letter from the city clerk did not accurately relate the action taken by the council; if in fact no action upon the claim was taken; and if the only action taken was to deny plaintiff's application to make a late presentation. The letter constituted a representation that action upon the claim had been taken. No notice of denial of the application to make a late presentation was given, as required by Government Code section 911.8. No valid reason existed for denying leave to make a late presentation, because the application had been made within a year following accrual of the cause of action and plaintiff was a six-year-old child." (*Harvey I*, *supra*, 252 Cal.App.2d at pp. 597–598, italics added.)

The court then stated that in a proper case a public entity may be estopped to assert the failure of a claimant to present a claim or to present it within the prescribed time. The court cautioned that its discussion of applicable principles of law was not a determination of the estoppel issue as a matter of law. (*Harvey I*, *supra*, 252 Cal.App.2d at p. 598.)

After the decision in *Harvey I* had been filed, the plaintiff filed a motion to reconsider the order sustaining the demurrer and requested an order extending the time within which to amend the complaint. After the trial court denied the motion, the plaintiff appealed, challenging both the denial of the motion and the judgment of dismissal based on the earlier order sustaining the city's general demurrer to the amended complaint. (*Harvey II*, *supra*, 271 Cal.App.2d at p. 817.) The demurrer had asserted the complaint did not allege the claim was presented to the city within the time prescribed by section 911.2. (*Harvey II, supra,* at pp. 817–818.)

In the second appeal, the plaintiff argued the city was estopped from raising the failure to file the claim within the then-applicable 100-day period, which had been the ground upon which the demurrer had been sustained. In contrast to *Harvey I*, this estoppel argument was directed to the *claim* presentation requirement, as opposed to the requirement for a *petition* challenging the denial of an application to file a late claim. The Court of Appeal determined this estoppel argument had merit and reversed the judgment of dismissal. The court stated the "plaintiff should be granted permission to file a further amended complaint premised on the theory of estoppel if she requests permission to do so and acts diligently." (*Harvey II*, *supra*, 271 Cal.App.2d at p. 820.) The court explained its conclusion as follows:

> "It now appears the city council actually denied plaintiff's claim and contemporaneously denied plaintiff's application to file the claim. As noted in our opinion, the claim could not be denied unless it had been filed and the action of the city council in denying the claim is inconsistent with its purported action in denying permission to file the claim. In any event, the city, through the notice given plaintiff by the city clerk, represented the claim had been filed and acted upon. This *clearly implied* the further

> representation plaintiff's application to make a late filing had been granted. Assuming plaintiff relied upon this representation, and for this reason did not petition the court for an order granting leave to present a late claim within the 20 day period provided by former Government Code section 912, she sustained injury as a result of the representation. Under these circumstances estoppel applies for the reason stated in our opinion on the former appeal." (*Harvey II*, *supra*, 271 Cal.App.2d at pp. 819–820, italics added.)

To summarize, *Harvey I* and *Harvey II* acknowledge the possibility that a public entity might represent, *by implication*, that an application to present a late claim had been granted, and further acknowledge this implied representation might estop the public entity from raising the applicant's failure to comply with the claim presentations requirements of the Government Claims Act. To address these possibilities, the plaintiff was allowed to amend the complaint to allege facts supporting the estoppel theory. (*Harvey II*, *supra*, 271 Cal.App.2d at p. 820.)

An important distinction between the facts presented in *Harvey I* and *Harvey II* and the instant appeal is that Mr. Harvey did not file a claim for his daughter that appeared to be timely on its face. As a result, there was no legal basis in *Harvey I* and *Harvey II* upon which the city could have considered and denied the claim without having first granted the application to file a late claim. In other words, granting the application to file a late claim was a necessary step before the city council could properly consider and reject the claim. The court recognized "the claim could not be denied unless it had been filed," and, as a result, concluded the city clerk's letter representing that the claim had been denied "clearly implied the further representation plaintiff's application to make a late filing had been granted." (*Harvey II*, *supra*, 271 Cal.App.2d at p. 819.)

In contrast, the Claims Board had a reason for considering and issuing denials of plaintiffs' claims without acting upon the applications to file late claims. The reason was that plaintiffs' claims appeared on their face to be timely. The possibility that the Claims Board could have considered and rejected plaintiffs' claims without granting their

applications to file late claims is relevant to the reasonable reliance element of plaintiffs' equitable estoppel theory.

5. Reasonableness of Plaintiffs' Reliance on an Implied Representation

When plaintiffs received the April 24, 2015, letters from the Claims Board rejecting the plaintiffs' claim, they had to decide what step to take next to recover damages. They had two choices, both of which involved going to court. One option was bringing a lawsuit on the causes of action described in the claim forms. (§ 945.6.) If this option was the correct choice, the lawsuit needed to be filed within six months of the date of the rejection notices. (§ 945.6, subd. (a)(1).) Their other option was to file a petition for relief from the claim filing requirements. (§ 946.6.) The reason for choosing a petition for relief was that they had presented their claims to the Claims Board one day late and, therefore, an essential element of the causes of action against defendants was missing—namely, timely compliance with the claims presentations requirements of the Government Claims Act.

Plaintiffs chose the first option and filed a lawsuit. They made this choice despite (1) knowing that the claims had been filed one day late and (2) being uncertain as to the status of their applications to the Claims Board to file late claims. They argue their choice was reasonable because they relied on the rejection notices, which stated the Claims Board "rejected your claim at its meeting on April 16, 2015" and issued a warning that, "[s]ubject to certain exceptions," plaintiffs had only six months to file a court action on their claims. Plaintiffs apparently made no attempt to gain additional information about the status of their applications to file late claims. The appellate record contains no evidence that plaintiffs contacted the Claims Board, either by telephone or in written correspondence, to gain additional information about the status of their applications. Instead, they assumed the Claims Board's silence on the subject meant the

applications to file late claims had been granted. This assumption was not reasonable. Silence is not consent, and it is not how applications are granted under California law.

First, as previously described, the circumstances presented in the *Harvey* decisions are distinguishable from plaintiffs' situation because plaintiffs filed claims that appeared to be timely due to the erroneous date of Taylor's death set forth in the claim forms. The *Harvey* decision did not involve an apparently timely claim and, therefore, the city lacked a legally recognizable basis for considering the claim without first granting the application to consider the late claim.

Second, section 911.6 states an application for leave to present is late claim is deemed denied if the Claims Board fails to act on the application within 45 days after it is presented. (§ 911.6, subd. (c).) This statutory provision about the legal effect of the Claims Board's silence on the subject of the applications means it was not reasonable to infer the Claims Board *impliedly* granted the application when it rejected the claims and made no mention of the applications to file late claims.

The deemed denial provision in section 911.6 and its relationship to equitable estoppel is discussed in *J.M.*, *supra*, 2 Cal.5th 648. In that case, a minor injured in a high school football game did not file a claim within the six months after being diagnosed with double concussion syndrome, which diagnosis date was regarded as when his personal injury cause of action accrued. (*Id*. at p. 651.) Nearly a year after the diagnosis, counsel for the minor presented the school district with an application to file a late claim. (*Ibid*.) "The application was timely under section 911.4." (*Id.* at pp. 651–652.) The school district took no action. Therefore, under section 911.6, subdivision (c) the application was deemed denied 45 days after its submission. (*J.M.*, *supra*, 2 Cal.5th at p. 652.) A year and four days after presenting the application to file a late claim, the minor petitioned the superior court for relief from the obligation to present a claim before bringing suit. (*Ibid*.) The trial court denied the petition. The Supreme Court affirmed.

In *J.M.*, the Supreme Court noted the record did not indicate the reasons for the school district's inaction on the application to present a late claim. (*J.M.*, *supra*, 2 Cal.5th at p. 654.) The court stated that such applications normally should be reviewed and acted upon, but an entity may fail or refuse to act on such applications for a variety of reasons. (*Id*. at p. 653.) As an example, the court stated "[t]he entity might … simply fail to act on an application through inadvertence." (*Ibid*.) The court then stated: "In *all* circumstances [where there is a failure to act], a late claim application is deemed denied after 45 days." (*Ibid.*, italics added; see § 911.6, subd. (c) [deemed denial provision].) The Supreme Court stated the 45-day limitation on the entity's time to act ensured that application would not languish. (*J.M.*, *supra*, 2 Cal.5th at p. 653.)

When a late claim application is deemed denied by 45 days of entity inaction, the procedure for determining the merits of the grounds set forth in the application (e.g., excusable neglect) is provided in section 946.6, subdivision (b). (*J.M.*, *supra*, 2 Cal.5th at p. 653.) The statute requires the applicant to seek relief in court six months after the application to the public entity is deemed to be denied. (§ 946.6, subd. (b).) In *J.M.*, the minor had not complied with that six-month period, which was mandatory. As a result, the court concluded the minor's claim was barred by operation of the statute and proceeded to consider the equitable theories raised by the minor. (*J.M.*, *supra*, 2 Cal.5th at pp. 656–658 [equitable relief].)

As to the minor's equitable estoppel argument, our Supreme Court noted the school district was not required to notify the minor under the statutory provisions, which provided for deemed denial. The court stated: "As a matter of law, the only possible way for [the minor] to have relied on the District's failure to act was to recognize that his application was deemed denied. (§ 911.6(c).) Equitable estoppel generally requires an *affirmative* representation or act by the public entity." (*J.M.*, *supra*, 2 Cal.5th at p. 657.)

The same holds true in the instant case. The only possible way for plaintiffs to have relied on the Claims Board's failure to act on their applications was to recognize

that the applications were *deemed denied*. Therefore, we reject plaintiffs' contention that the Claims Board's letters of April 24, 2015, and its subsequent failure to respond to the applications to file late claims led plaintiffs to reasonably believe no further action was necessary to perfect their claims. The failure of the Claims Board to mention the applications to file late claims in the letters notice rejecting plaintiffs' claims is not an affirmative representation of the type generally required for asserting equitable estoppel against a public entity. (See *J.M.*, *supra*, 2 Cal.5th at p. 657.) Consequently, plaintiffs cannot establish the essential elements of their equitable estoppel theory and, therefore, that theory does not justify their failure to comply with the claim presentation requirements contained in the Government Claims Act. As a result, their complaint is barred and the trial court properly granted the motion for judgment on the pleadings.

6. Equitable Tolling

We requested supplemental briefing on the issue of equitable tolling, an issue mentioned in *J.M.*, *supra*, 2 Cal.5th at page 657. (See § 68081 [supplemental briefing].) Defendants argued that whether the filing of plaintiffs' complaint on October 22, 2015, equitably tolled the six-month period for filing a petition for relief from the claim filing requirements of section 945.4 was irrelevant to the trial court's decision to grant their motion for judgment on the pleadings. We agree equitable tolling would not cure the defects that bar plaintiffs' complaint, and the possibility of equitable tolling applying to a petition for relief from the claim filing requirements is not ripe because no such petition appears in the appellate record.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

_____
FRANSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
SNAUFFER, J.